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In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

SHERYL YSBRAND AND MARY COONEY,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI[1]

The Chamber of Commerce of the United States of America is the nation's largest federation of business companies and associations. The Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, sector, and geographic region of the country. The Chamber serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

The Alliance of Automobile Manufacturers, Inc. is a nonprofit trade organization formed in 1999. Its mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to emerging challenges associated with the manufacture of new automobiles. Petitioner DaimlerChrysler is a member of the Alliance, along with eight other major auto manufacturers operating in North America.

Amici's members are subjected to abusive class actions in state courts on a regular basis. They accordingly have a strong interest in ensuring both that the constitutional limitations on a court's choice of law apply with full force in the class action context and that the class action does not become a means for undermining state sovereignty in derogation of the Commerce Clause and traditional principles of federalism.

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[1] This brief was not authored in whole or in part by counsel for any party in this case, and no one other than amici, their members, or their counsel made any monetary contribution to its preparation or submission. S. Ct. R. 37.6. The parties have consented to the filing of this brief; their letters of consent are on file with the Clerk.

SUMMARY OF ARGUMENT

No legal issue is of greater concern to the U.S. business community than the abuse of the class action device. Over the last decade, courts in certain jurisdictions—including Alabama, Illinois, and now Oklahoma—have developed a reputation for their willingness to certify nearly any class, even when the class is asserting claims that elsewhere would require highly individualized litigation. Courts in these jurisdictions have arrogated tremendous power over the business activities of corporations in all 50 States.

The decision of the Oklahoma Supreme Court in this case is part of a disturbing trend in class actions—the distortion of choice-of-law rules in order to facilitate the certification of the broadest class possible. Implicitly recognizing that it would be impracticable to try a class action under the laws of the 50 States and the District of Columbia, the Oklahoma Supreme Court turned choice-of-law analysis on its head—presupposing that it would be permissible (and indeed desirable) to subject all the claims to the law of a single State. The court then concluded that of all the States, Michigan had the most significant relationship to "the parties and this litigation." Pet. App. 13a.

As the petition persuasively argues, this result-oriented approach is in direct conflict with several of this Court's decisions, including *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), and *Home Insurance Co.* v. *Dick*, 281 U.S. 397 (1930), as well as with the decisions of other state courts and the federal courts of appeal. The Constitution's due process guarantee prohibits a court from adjudicating a party's substantive rights based upon the law of a State that lacks sufficient connection to the transaction underlying the claim. Whether in a class action or in an individual lawsuit, the court must conduct an individualized analysis with regard to each claim in order to determine whether due process permits the application of a particular State's law.

The Oklahoma Supreme Court's approach to class litigation also does great violence to the principles of federalism and state sovereignty. This Court has made clear that a State may not regulate conduct outside its own territory without the consent of Congress. *E.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 421-22 (2003); *Healy* v. *Beer Inst.*, 491 U.S. 324 (1989). The Oklahoma Supreme Court's ruling entirely eviscerates that principle. If the law of the defendant's home State can be applied in a class action regardless of where the underlying transaction took place, then States will lose the ability to regulate the conduct of out-of-state corporations within their own boundaries.

The petition demonstrates why review is warranted, given the conflict of authority regarding the propriety of applying the law of a defendant's domicile to the claims of a nationwide class, and the inconsistency between the decision below and previous decisions of this Court. Accordingly, we will not burden the Court with additional analysis of the case law. Instead, this brief addresses the pervasiveness of class action abuse, the disruptive effect that the Oklahoma Supreme Court's approach to class action litigation would have on state sovereignty and on commerce nationwide, and the importance of this Court's intervention without awaiting a final judgment on the merits that likely will never eventuate.

ARGUMENT

I. The Last Decade Has Seen An Explosion In Nationwide Class Action Litigation, Even With Regard To Highly Individualized State-Law Claims.

Class action litigation has exploded over the last fifteen years. According to one study, from 1994 to 1997, U.S. companies experienced a growth rate in the number of putative class actions filed against them ranging from 300% to 1000%. 1 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23, at ix-x

(May 1, 1997); see also Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 184 (2001) (RAND analysts concluded that class action lawsuits likely surged during the 1990s, with about half of class action litigation activity taking place in state court).[2]

Yet the dramatic growth in class litigation should not be misread as a sign that the rights of more individuals are being vindicated. The modern class action is often a lawyer-initiated, lawyer-directed affair designed to generate a substantial fee award.[3] To that end, prospective class counsel regularly scan

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[2] Another recent survey found that between 1988 and 1998, class actions in federal court increased by 338%, and state court class actions were up by 1042%. *Class Action Litigation: A Federalist Society Survey*, 1 CLASS ACTION WATCH 1, 3 (Issue 1 1999); see also *Hearing on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm.*, 105th Cong. (Mar. 5, 1998) ("1998 Class Action Hearings") (statement of John W. Martin, Jr.). See generally DEBORAH HENSLER, ET AL., CLASS ACTION DILEMMAS 62-68 (RAND 2000) (discussing evidence indicating an increase in number and diversity of class actions in the late 1990s).

[3] A Federal Judicial Center study of class actions found that, in three of the four districts studied, the mean fee award in class actions that settled after certification and that paid some money to class members was in excess of $1 million. THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES fig. 69 (1996), reprinted in 10 NEWBERG ON CLASS ACTIONS 181, 395 (4th ed. 2002) (mean in one of those districts was over $2.5 million, and mean in fourth district was $732,537). And the awards frequently bear no relationship to the relief garnered by the class. Among the most extreme examples is the fee award in a recent Madison County, Illinois case against AT&T and Lucent Technologies, in which the putative class alleged that the defendants had overcharged for rented telephones. After settlement, class members claimed $8.4 million

news reports for possible bases for class litigation, seek out individuals to serve as named plaintiffs, and then shop for friendly courts in which to file suit. They then obtain class certification—often, as here, without showing that litigation on a class-wide basis is consistent with the constitutional rights of the defendant and absent class members—and then use the threat of a huge verdict to force a settlement that provides a large fee for class counsel.[4]

The most effective way for a class action lawyer to ensure a lucrative settlement is to allege and certify a *nationwide* class, thus maximizing the coercive value of the certification order. See *infra* at 17-20. As the federal courts have recognized, however, nationwide class actions raising claims under state law generally may not be certified consistent with the requirements of Rule 23, due process, and federalism because of complexity resulting from the need to apply the varying laws of the 50 States. *See, e.g.*, *Andrews* v. *American Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996); *Castano* v. *American Tobacco*

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collectively from the settlement fund, whereas class lawyers took home more than $84.5 million in fees and expenses. See Trisha Howard, *Lawyers Profit Most in Suit, Defendant Says*, ST. LOUIS POST-DISPATCH, Mar. 31, 2004, at A1 (settlement agreement also required defendant AT&T to provide $50 million in free calling cards to charity). See also, *e.g.*, *MassMutual Class-Action Settlement Withdrawn*, BEST'S INSURANCE NEWS, Feb. 27, 2001 (discussing New Mexico class-action settlement, which would have given almost $8 million in fees to class counsel and $350,000 to the two named plaintiffs but no monetary relief to the more than six million absent class members); Thomas J. Cole, *Attorney Backs Out Of Insurance Settlement*, ALBUQUERQUE J., Feb. 23, 2001, at A1 (describing another case in which the same class counsel shared in a $7 million fee award, while the two named plaintiffs received $30,000 each and three million putative class members received no monetary award).

[4] See 1998 Class Action Hearings (testimony of former Attorney General Dick Thornburgh, Mar. 5, 1998) (discussing examples).

Co., 84 F.3d 734 (5th Cir. 1996); *Georgine* v. *Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), aff'd *sub nom. Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997); *In re Am. Med. Sys.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

Seeking a more hospitable forum, many class action lawyers have shifted their attention to state court. JOHN H. BEISNER & JESSICA DAVIDSON MILLER, CLASS ACTION MAGNET COURTS: THE ALLURE INTENSIFIES 3 (Manhattan Inst. July 2002) (www.manhattan-institute.org/html/cjr_5.htm); see also Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 575 (1996) (certification of nationwide classes by state courts "has been increasing in recent years"); *The Interstate Class Action Jurisdiction Act of 1999: Hearing Before the House Judiciary Comm.*, 106th Cong. (July 21, 1999) (statement of former acting Solicitor General Walter E. Dellinger); *cf.* Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 386 (1998) ("It is no secret that class actions—formerly the province of federal diversity jurisdiction—are being brought increasingly in the state courts"); *Class Action Litigation: A Federalist Society Survey*, *supra*, at 1, 3 (between 1988 and 1998, state-court class actions were up by *1042%*, compared with 338% in federal court).

Moreover, class action attorneys are not using just any state court in their effort to circumvent the constitutional limitations on class actions. With increasing frequency, they are filing their cases in state courts that have acquired a reputation for acquiescing in requests for nationwide certification and running roughshod over the constitutional rights of defendants and absent class members.

For example, after a few class-friendly decisions in Alabama, class action lawyers from across the country flocked to that State to file class actions. In 1995-1997, courts in six

thinly populated Alabama counties certified 43 class actions, at least 28 of which were brought on behalf of nationwide classes. STATESIDE ASSOCIATES, CLASS ACTION LAWSUITS IN STATE COURTS: A CASE STUDY IN ALABAMA (1998) (attached to statement of Dr. John B. Hendricks, on behalf of Small Business Council of the U.S. Chamber of Commerce, before the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee (Mar. 5, 1998)).[5] The Alabama Supreme Court finally intervened, making clear that, under that State's procedural rules, trial courts were required to perform a rigorous analysis of factual issues, choice-of-law issues, and other requirements for class certification.[6] As a result, class action filings in Alabama have slowed dramatically. See Eddie Curran, *Welcome to Greene County, America's Class Action Capital*, MOBILE REGISTER, Dec. 26, 1999, at 1B.

But the intervention of the Alabama Supreme Court has served only to cause class action lawyers to take their show on the road to such class-action/mass-joinder havens as

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[5] On at least one occasion, the Alabama courts certified a nationwide class identical to one that a federal court refused to certify on constitutional grounds. Compare, *e.g.*, Order Certifying Plaintiff Class at 8, *Naef* v. *Masonite Corp.*, No. CV-94-4033 (Mobile County Cir. Ct. Nov. 15, 1995), reprinted in *Ex parte Masonite Corp.*, 681 So. 2d 1068, 1086 (Ala. 1996) (approving plan to try 50-state consumer fraud class action), with *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig*, 170 F.R.D. 417, 422, 425, 427 (E.D. La. 1997) (denying certification of identical class because, among other things, the suit would involve applying 50 different legal standards, and *Naef*'s effort to synthesize those standards into an "Esperanto" amalgamation that did not represent the legal standard of any State inadequately protected defendants' constitutional rights).

[6] See, *e.g.*, *Ex parte Green Tree Fin. Co.*, 723 So. 2d 6, 9 (Ala. 1998); *Ex parte Household Retail Servs., Inc.*, 744 So. 2d 871, 878-79 (Ala. 1999); *Mann* v. *GTE Mobilnet, Inc.*, 730 So. 2d 150, 152 (Ala. 1999).

Mississippi, West Virginia, Washington, New Mexico, and southern Illinois.[7] To date, few state appellate courts have interceded to ensure that class action litigation within their jurisdictions is conducted in a manner consistent with the Constitution.

Indeed, appellate courts in Illinois have affirmed the certification of multistate class actions based upon the conclusion that Illinois law governs all claims against an Illinois corporation, regardless of where those claims arose. *E.g.*, *Clark* v. *TAP Pharm. Prods.*, 798 N.E.2d 123, 129 (Ill. App. Ct. 2003) (upholding application of Illinois law to transactions outside Illinois that involved non-Illinois class members and medical care providers, based solely on fact that defendant's corporate headquarters is in Illinois); *Avery* v. *State Farm Mut. Auto. Ins. Co.*, 746 N.E.2d 1242, 1254-55 (Ill. App. Ct. 2001) (in case involving auto insurance claims, applying law of defendant's domicile to claims arising elsewhere), appeal granted, 786 N.E.2d 180 (Ill. 2002). The class action bar is well aware of this trend and has responded accordingly. Madison County, Illinois is now ranked third nationwide in class action filings each year behind the far more populous counties containing Los Angeles and Chicago. Beisner & Miller, 25 HARV. J.L. & PUB. POL'Y at 159. Approximately 81% of the putative class actions filed in Madison County between February 1998 and March 2001 sought to certify nationwide classes. *Id.* at 169; see also Tom McCann, *Class Actions: The Battle Heats Up*, CHICAGO LAW., Apr. 2004, at 8, 9 (106 class actions were filed in Madison County in 2003, as compared with 11 filings in 1999); Mark Ballard, *Mississippi Becomes a Mecca for Tort Suits*, NAT'L L.J., Apr. 30, 2001, at

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[7] See, *e.g.*, John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court,* 25 HARV. J.L. & PUB. POL'Y 143, 159 (2001) (discussing increase in nationwide class actions in various states).

A1 (describing similar phenomenon for mass-joinder suits in Mississippi).

The courts of Minnesota have taken the same approach. In *Peterson* v. *BASF Corp.*, a nationwide class of farmers asserted claims under the New Jersey Consumer Fraud Act with regard to BASF's marketing of two herbicide products. See 618 N.W.2d 821, 822 (Minn. Ct. App. 2000). Although BASF is headquartered in New Jersey, neither the products themselves nor the marketing materials were developed in that State. Nevertheless, the trial court certified a nationwide class and allowed it to pursue claims under New Jersey law. The court of appeals affirmed the certification in an opinion that did not even consider BASF's arguments with regard to choice of law. See *id.* at 825-26. A $52 million judgment was ultimately awarded against BASF. See 657 N.W.2d 853 (Minn. Ct. App. 2003).

In the post-trial appeal, the appellate court and the Minnesota Supreme Court both invoked ill-founded procedural theories in order to avoid reaching the question whether the Constitution would permit the application of New Jersey law to claims that arose elsewhere.[8] Indeed, the only substantive discussion of the choice-of-law issue by any court in *Peterson* is in a concurrence by one appellate court judge, who observed:

> [A]t the end of the day, this dispute is the poster child for national class action reform. We have here a Minnesota district court, applying a New Jersey

[8] See 657 N.W.2d at 875 (court of appeals: BASF could not appeal application of New Jersey law after final judgment because court's previous decision affirming class certification, which did not mention choice of law, nevertheless constituted "law of the case" on that issue); 675 N.W.2d 57, 67-68 (Minn. 2004) (supreme court: BASF "waived" supreme court review on choice of law by failing to seek discretionary review of the issue following the appellate court's interlocutory decision affirming class certification).

> consumer fraud statute to a nationwide class of plaintiffs, with few of those plaintiffs residing in New Jersey. And it is probably a fair assumption that the legislative authors of the New Jersey consumer protection scheme did not have in mind midwestern farmers purchasing agricultural chemicals as the protected class. * * *
>
> This is not a recipe for uniformity or consistency, it is fair neither to claimants nor defendants and it is long past time for national policy makers to address class action procedures.

657 N.W.2d at 875 (Anderson, J., concurring specially). Unfortunately, these sentiments did not persuade the Minnesota courts to take action themselves to correct the problem.

Courts in other States also have certified nationwide or multistate class actions based upon the law of a single State without paying the slightest attention to the due process and sovereignty concerns implicated by such an approach. For example, a Washington court certified a 27-state class action seeking "inherent diminished value" ("IDV") damages under the putative class members' automobile insurance policies, on the theory that the laws of the various States did not materially differ. *Busani* v. *United Servs. Auto. Ass'n*, No. 99-2-08217-1, Class Certification Order (Pierce County Super. Ct. May 11, 2001). In so holding, the court ignored the fact that many jurisdictions had never addressed whether IDV damages were cognizable and others had expressly held that they are not. See, *e.g., Johnson* v. *State Farm Mut. Auto. Ins. Co.*, 754 P.2d 330, 331 (Ariz. Ct. App. 1988) (denying IDV claim); *Ray* v. *Farmers Ins. Exch.*, 200 Cal. App. 3d 1411, 1415-17 (1988) (same). In a different insurance case, a New Mexico trial court certified a nationwide class of MassMutual policyholders and proceeded to apply New Mexico law, with no choice-of-law

analysis at all. *Wilson* v. *Massachusetts Mut. Life Ins. Co.*, No. D-0101-CV-98-02814 (1st Jud. Dist. Ct. Santa Fe County Nov. 16, 1999) (orders certifying class and awarding partial summary judgment in favor of lead plaintiff).[9]

In the instant case, Oklahoma has joined the ranks of States that are willing to set aside the U.S. Constitution in order to foster class-based litigation. To avoid the manageability problems that would inevitably result from litigating this case under 50 different legal standards, the Oklahoma Supreme Court analyzed the claims collectively and applied the law of the only State that *all* the claims had in common—the defendant's home State—regardless of whether Michigan had any relevant contacts to the underlying transactions. Pet. App. 13a (applying Michigan law because Michigan had a "more significant" relationship "to the parties and this litigation" than any other State). This analysis flies in the face of this Court's directive to assess—for each individual claim—the constitutionality of applying a particular State's law. *Shutts*, 472 U.S. at 818, 821-22 (the governing State "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, 'contacts creating state interests,' in order to ensure that the choice of [that State's] law is not arbitrary or unfair") (quoting *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)).[10]

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[9] See also *Wershba* v. *Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145, 159-60 (Ct. App. 2001) (affirming certification and settlement of nationwide class action under California's consumer protection laws).

[10] There can be no serious doubt that, in an individual breach-of-warranty suit filed by an Oklahoma resident against the petitioner, Oklahoma courts would apply Oklahoma law, not Michigan law. See Pet. App. 11a-13a (citing *Collins Radio Co.* v. *Bell*, 623 P.2d 1039, 1047 (Okla. Ct. Civ. App. 1980), and *Bohannan* v. *Allstate Ins. Co.*, 820 P.2d 787, 795 (Okla. 1991)). It should thus be self-evident that

As discussed in more detail below, the disruptive effect of nationwide class action litigation on U.S. commerce cannot be overstated. Any State that shows a willingness to set aside constitutional limitations in order to certify a class will necessarily attract far more than its share of nationwide class litigation. Like Illinois, Oklahoma will undoubtedly draw lawyers from across the nation who are attempting to certify nationwide classes. Through the nationwide class action, a few class-friendly state courts can effectively hijack significant portions of the U.S. economy. As Judge Easterbrook has explained, even if only 10% of judges would be receptive to a nationwide class action, one such judge "is bound to turn up if plaintiffs file enough suits—and, if one nationwide class *is* certified, then all the no-certification decisions fade into insignificance. A single positive trumps all the negatives." *In re Bridgestone/Firestone Inc.*, 333 F.3d 763, 766-67 (7th Cir. 2003). This Court's intervention is desperately needed to ensure that constitutional limitations on choice of law are applied with equal force in the class action context and thereby prevent the abuse that is now rampant in the state courts.

II. The Distorted Choice-Of-Law Analysis In This Case Undermines State Sovereignty, Principles Of Federalism, And Commerce Across The Nation.

The choice-of-law analysis in this case threatens to work a radical change in the legal foundation on which U.S. commerce proceeds. For more than two hundred years, the several States have regulated the conduct of business within their respective borders. Only Congress has the power to encroach on a State's

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the Oklahoma Supreme Court used the procedural device of the class action to alter the substantive law with regard to many class members' claims. That alone should be sufficient reason to doubt the validity of the state courts' insistence on applying Michigan law nationwide.

sovereignty by imposing a system of uniform national regulation on interstate commerce. U.S. CONST. art. I, § 8, cl. 3. In this case, however, the state courts of Oklahoma have usurped that role, imposing the law of a single State upon the conduct of the defendant in all States solely for the convenience of the lawyers who filed the case.

The U.S. Constitution contemplates that each of the 50 States is a sovereign of "equal dignity" with a distinct sphere of authority. *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959). Accordingly, this Court consistently has rejected States' efforts to apply local law to transactions that occurred entirely in other States. *See, e.g.*, *Campbell*, 538 U.S. at 422 ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction"); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568-73 (1996) (Alabama jury could not apply Alabama law to punish defendant for transactions taking place in other States); *Healy*, 491 U.S. at 336 (Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders"); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 582-83 (1986) (rejecting New York's attempt to "project its legislation" into other States); *Shutts*, 472 U.S. at 818-23 (Kansas court could not apply forum law to claims of class members with no connection to Kansas); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 641-43 (1982) (plurality op.) (Illinois anti-takeover statute impermissibly regulated transactions occurring entirely outside of Illinois); *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *New York Life Ins.*

Co. v. *Head*, 234 U.S. 149, 161 (1914) ("it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State * * * without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends"); *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction").

The theory adopted by the Oklahoma Supreme Court is flatly inconsistent with the system of state sovereignty and federalism contemplated by the Constitution. Through common law and legislation, each of the 50 States is free to develop its own standards for regulating business, based upon its own assessment of the relevant policy interests. But if choice of law in a nationwide class action may depend upon where the defendant maintains its headquarters—rather than, for example, where the product at issue is sold or delivered (see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 191 & cmts. e, f (1971))—then each State necessarily loses the ability to apply the standard of its choosing to business conduct within its own borders. Thus, in this case, because of a state court decision in Oklahoma, the law of Alabama will not govern the breach of warranty claims of a class member who resides in Alabama and who purchased a vehicle in Alabama from an Alabama dealership for use in Alabama.[11]

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[11] The Alabama Supreme Court, for example, has definitively rejected causes of action based on the risk of future injury, like the cause of action at issue here. See *Ford Motor Co.* v. *Rice*, 726 So. 2d 626, 631 (Ala. 1998). Under the Oklahoma Supreme Court's approach, an Alabama plaintiff—whose claims would clearly be barred in an individual lawsuit—may have the opportunity to persuade the court to accept her claims under a different State's law, simply because they are part of a case certified as a class action.

The absurdity of this approach is heightened in this case, in which a State with no real interest in regulating its citizens' extraterritorial conduct was foisted into doing so by another State's courts. Here, it was the state courts of *Oklahoma* that decided to apply Michigan law to transactions that occurred beyond Michigan's borders—over the objection of the State of Michigan itself. See Pet. 6-7 (discussing amicus brief filed by State of Michigan in support of DaimlerChrysler's petition for rehearing). In this respect, too, the plaintiffs' theory undermines the sovereignty of each State.

This result is potentially harmful, not only to businesses operating nationwide, but also to absent class members who may see their substantive rights sacrificed in order to ensure certification of the broadest class possible. If the defendant maintains its headquarters in Washington, for example, which permits punitive damages only when authorized by statute,[12] class members from more permissive States may be prejudiced by the application of Washington law. In such a case, the burden would be on the absent class member to be aware of the legal issue and to opt out of the class in order to avail herself of the legal protections afforded her by her own State's law.

The practice of applying the law of the defendant's domicile in order to facilitate nationwide class litigation also has the deleterious effect of concentrating tremendous regulatory power in the courts of a few class-friendly jurisdictions around the country. In Madison County, Illinois, for example, plaintiffs' lawyers often file cookie-cutter lawsuits against many different defendants in the same industry. Of the 43 class action suits filed in Madison County in 2001, 25 proposed nationwide or multistate classes challenging common

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[12] *E.g., Dailey* v. *North Coast Life Ins. Co.*, 919 P.2d 589, 590 (Wash. 1996); *Spokane Truck & Dray Co.* v. *Hoefer*, 25 P. 1072 (Wash. 1891).

practices allegedly used by many different corporations in the financial services or insurance industries. BEISNER & MILLER, *supra*, at 4-6 (discussing, for example, lawsuits against Allstate, AIG, Prudential, Country Mutual, Progressive, Farmers, St. Paul Fire and Marine, CGU, Hartford, Geico, and Shelter Insurance, all challenging the same practice).[13] Using the theory adopted by the Oklahoma Supreme Court, the Madison County courts could certify nationwide or multistate class actions in each of these cases under the law of the defendant's home State. Thus, the Madison County courts would be in a position to regulate an entire industry nationwide—a power ordinarily reserved for Congress under the Commerce Clause.

The prohibition on the extraterritorial application of state law is not just a matter of constitutional law; it is also a practical necessity. Under the approach adopted by the Oklahoma courts, two companies that compete directly against one another for business in a particular region would find themselves operating under different legal standards if they maintain their respective headquarters in different States. For example, the advertising of packaged baked goods in Idaho might be governed by the law of Illinois (for the Illinois-based Sara Lee), as well as the law of Connecticut or New Jersey (for Pepperidge Farm, which is a Connecticut subsidiary of a New Jersey company). The two companies, meanwhile, would need to structure their business operations in Idaho based upon both

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[13] See also *Bunting* v. *Progressive Corp.*, 2004 WL 936552 (Ill. App. Ct. Apr. 30, 2004) (non-Illinois member of multistate class alleging that insurance company and its valuation vendor systematically undervalued vehicles declared to be a total loss could state claim against defendant/vendor under Illinois consumer fraud statute because Illinois is where defendant/vendor maintained its principal office and presumably created its allegedly deceptive policy of undervaluing automobiles).

Idaho law and the law of their respective home States, even though the relevant legal standards may be in conflict.

This is no way to run an economy. The orderly process of commerce depends upon uniform expectations. States need the authority to regulate local markets, and companies need to be able to predict with reasonable certainty which law will govern their conduct in a particular State. If, with respect to a particular industry, Congress determines that nationwide standards are necessary, then it may choose to take action. Until then, principles of federalism and state sovereignty require that each State have the ability to achieve local uniformity through the application of its own laws. This system cannot tolerate the application of one State's law beyond its borders in nationwide class actions.

III. The Coercive Nature Of Class Action Litigation And The High Likelihood Of Settlement Make Review At This Stage Of Litigation Essential.

The procedural posture of this case—after class certification and before a trial on the merits—is not a bar to this Court's consideration of the choice-of-law issue. As the petition explains, the decision below resolved the important constitutional question now before the Court and is a final judgment for purposes of 28 U.S.C. § 1257(a). Pet. 26-30 (discussing *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975)). Indeed, to wait for a case that presents a similar issue following entry of final judgment on the merits would be unrealistic, because defendants who face the prospect of litigating a case certified as a nationwide class action often have no choice but to settle long before the case goes to trial.

In any nationwide class action, a class certification order hangs like a Damoclean sword over the defendant, often forcing it into an unwarranted settlement and a coerced relinquishment of its right to trial. As the Fifth Circuit has explained:

> [C]ertification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards.

Castano, 84 F.3d at 746 (citations omitted). Accordingly, the certification of a large class "can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999); see also *Castano,* 84 F.3d at 746 ("certification creates insurmountable pressure on defendants to settle" because of "[t]he risk of facing an all-or-nothing verdict * * * even when the probability of an adverse judgment is low"); *Parker* v. *Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002); *Newton* v. *Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995); *cf.* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1254 (2002) ("Loose certification standards risk high costs by inviting frivolous class action suits that defendants settle rather than face potentially crippling, even bankrupting, damage awards").

As a result of these pressures, "the vast majority of certified class actions settle." Bone & Evans, *supra*, at 1291. A 1995 study conducted by the Federal Judicial Center found that for the four federal district courts studied, the percentage of certified class actions terminated by a class settlement ranged from 62% to 100%. WILLGING ET AL., *supra*, tbl. 40, reprinted in 10 NEWBERG at 437. And this study did not include either mass tort class actions—which are "one of the most settlement-prone areas of class action litigation"—or class actions filed only for settlement purposes under Rule 23(e). Bone & Evans,

supra, at 1292 n.148; see also George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 522 (1997) (observing that "virtually every mass tort class action that has been successfully certified has settled out of court rather than been litigated to judgment"). Other studies have produced similar results. *E.g.*, Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 IND. L.J. 497, 501 (1987) (reporting settlement rate of more than 78% for certified and consolidated class actions based upon sample from the Northern District of California). Moreover, even if a certified class action is litigated to final judgment, an improper *grant* of certification—such as the one here—will still evade review if the defendant is able to prevail on the merits.

For obvious reasons, the settlement pressure in a case involving a *nationwide* class is even greater, given the stakes. A nationwide class action can threaten even the largest U.S. corporations with enormous business disruption, staggering damages, and even bankruptcy. If, not wanting to "roll the[] dice," the defendant decides to settle the suit, "the class certification—the ruling that will have forced them to settle—will never be reviewed." *Rhone-Poulenc*, 51 F.3d at 1298. By definition, the important choice-of-law issue presented here will arise only when a nationwide class is certified by a class-friendly court. In such a case, it is particularly unlikely that the Court would have an opportunity to review the issue after final judgment on the merits.

This Court recognized the importance of immediate review of class certifications when it submitted to Congress the amendment to Fed. R. Civ. P. 23 that gives the federal courts of appeals discretion to hear appeals from the grant or denial of class certifications without applying either the requirements of 28 U.S.C. § 1292(b) or the exacting standards for a writ of mandamus. The Advisory Committee Note accompanying the

new rule specifically recognizes that a discretionary power of interlocutory review of class certifications is desirable because "[a]n order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) 1998 Adv. Comm. Notes. Similarly, the 1997 Report of the Judicial Conference's Committee on Rules of Practice and Procedure recommending approval of Rule 23(f) opined that "the proposed change to Rule 23(f) could have immediate and substantial beneficial impact on class action practice" because "[a] certification decision is often decisive as a practical matter." Whereas the denial of certification can put an end to an action seeking to vindicate large numbers of small claims, "certification can exert enormous pressure to settle."

For the same reasons, this Court can and should grant certiorari to review important constitutional issues relating to class litigation at the certification stage, rather than deferring review until final judgment on the merits—a time that, for the vast majority of cases, will never come. See *Cox Broadcasting*, 420 U.S. at 482-83 (review of interlocutory state court decision resolving an issue of federal law is appropriate when "the federal issue has been finally decided in the state courts," the party seeking review "might prevail on the merits on non-federal grounds" and render Supreme Court review of the federal issue unnecessary, and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action").

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted.

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